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No. 255

Supreme Court of the United States

October Term, 1948

GERHART EISLER, *Petitioner,*

vs.

THE UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITIONER'S REPLY TO THE BRIEF OF THE UNITED STATES IN OPPOSITION

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The opposition of the United States to the petitioner's request for a writ of certiorari ignores many of the questions raised by the petition, and misstates and distorts others. In order to clarify the issues before the Court, we believe it necessary to reply to the government's opposition.

1. The Affidavit of Bias and Prejudice.

The attempt of the government to strip the affidavit of bias and prejudice of certain of its pertinent allegations is obviously strained and artificial. The portions of the affidavit referred to by the government (Opp. 12) are not

argument or innuendo; they are stated as beliefs on the part of the petitioner. (R. 223-224). An affidavit of bias and prejudice need not rest on personal knowledge alone but may be based upon information and belief. *Berger v. United States*, 255 U. S. 22, 34. Further, it is of significance that the construction of the affidavit now offered by the government was not considered by either the trial judge or the court below. The trial judge took issue with the facts alleged, ruling that the judge against whom an affidavit of bias and prejudice is filed may file an answer and contest the facts (R. 207-208). Both the majority and minority below took the same view of the affidavit as did the petitioner (R. 237, 242). And indeed the paraphrase objected to by the government (Opp. 12) was substantially the same as that made by Judge Prettyman (R. 242). Clearly, the affidavit should be read fairly as a whole, and not distorted for the purpose of negating its clear import. Significantly, also, the government fails to mention or attempt to distinguish the case of *Barsky v. Holtzoff*, April Term, 1947, Misc. 126, U. S. App. D. C., decided June 11, 1947, a case considered by both the petitioner and Judge Prettyman to be controlling, although ignored by the majority below (Pet. 16).

Even under the government's version, the character of the bias and prejudice alleged in the affidavit was similar to that asserted with regard to the trial judge in the *Berger* case, *supra*, and considered sufficient by this Court. The affidavit, here, did not assert a preconception on issues on the part of the trial judge, but a personal bias and prejudice by the trial judge against the petitioner and others like him (R. 225). The basis of the affidavit was not that the trial judge had preconceptions on the issue of communism, but that he had a personal bias and prejudice against the petitioner and other alien communists, and would not give them a fair trial regardless of the issue involved.

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The government's opposition concedes that the question of timeliness, here, is solely one of due diligence. (Opp. 16). It follows this with the unsupported assertion that a lapse of nine days between knowledge of the assignment of the trial judge and the filing of the affidavit under the circumstances here involved (i. e. the death of the brother of chief trial counsel, and the need for conference and investigation) did not constitute such due diligence (Opp. 17). The affidavit, it should be noted, was filed six days before commencement of trial (R. 231), and would not have delayed the trial (R. 243). Obviously, this whole question of due diligence under the statute is an extremely important one and requires clarification and decision by this Court.

2. The Conduct of the Trial.

The government's opposition makes the bald assertion that the record does not support the petitioner's contention that the conduct of the trial judge deprived him of a fair trial (Opp. 17). It is impossible in the short space of a petition for certiorari to detail the numerous instances in which the actions of the trial judge transgressed the standards of impartial conduct. We refer the Court again to the record references in the petition (Pet. 6-8, 19), as well as the trial judge's own admissions (R. 51, 190, 191).

In the course of its argument, the government states the obvious that: "Impartiality does not demand that the rulings in favor of one side shall be arithmetically equal to rulings for the other" (Opp. 17-18). But no such contention was made either to the court below or in the petition. Intrusion of this false issue by the government can serve only to divert this Court from the real questions presented.

Significantly enough, although the government does devote space to the destruction of a straw man set up by itself, it ignores completely the specific contentions raised by the petition such as the trial judge's violation of Rule

30 of the Rules of Criminal Procedure (Pet. 8), his inconsistent rulings favoring the prosecution (Pet. 7-8), and his charge to the jury which was equivalent to a direction of a verdict of guilty, thereby denying to petitioner the right to trial by jury (Pet. 9, 19-20). See *Starr v. United States,* 153 U. S. 614, 624-626; *Weiler v. United States,* 323 U. S. 606, 611; *Bollenbach v. United States,* 326 U. S. 607, 614.

3. Judicial Review of Congressional Action.

The government answers the petitioner's contention that the prosecution failed to prove an essential allegation of the indictment; i. e., that petitioner was summoned to testify "upon matters of inquiry committed to" the Commitee (R. 215), by making reference to the enabling resolution and the subpoena served on the petitioner (Opp. 20). But these documents show only the authority given the Committee by Congress. They do not constitute evidence that the Committee was acting within the confines of that authority, or that the petitioner was actually summoned to testify upon a matter within that authority.

Under the doctrine of *Sinclair v. United States,* 279 U. S. 263, 296, 297, the government was required to introduce evidence as to the subject on which petitioner was summoned to testify and to show its pertinence to the matter under inquiry before the Committee. No such evidence was presented. The government cites *McGrain v. Daugherty,* 273 U. S. 135, and *Josephson v. United States,* 165 F. (2d) 86, as contrary authority. But in both cases the persons charged with contempt explicitly stated that they would not answer pertinent questions.

No such situation is presented here. The petitioner never asserted that he would not answer pertinent questions. He was not charged, as were the others, with a refusal to answer questions, but with a wilful default. The indictment expressly alleges that petitioner was sum-

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moned to testify "upon matters of inquiry committed to" the Committee (R. 215). This was clearly a necessary allegation, in view of the statutory text, and is recited in addition to the allegation of the refusal to be sworn. Hence both allegations had to be proved, and proof of one does not eliminate the need to prove the other. Obviously there is no doctrine of law that if one allegation is proven against a defendant, the defendant may not therefore challenge the failure to prove another necessary allegation of the indictment. Yet this, in essence, is the contention presented by the government.

The government further answers the contention that the petitioner was denied an opportunity to prove that he was not summoned to testify on matters committed to the Committee by Congress, by the assertion that the motives of the Committee "are not matters for judicial cognizance," relying again on the *Josephson* case, *supra* (Opp. 21). But that case involved only a general attack on the Committee's validity, see 165 F. (2d) at 89. It did not involve, as does the present case, an offer to prove that the Committee was not, as regards the petitioner, acting within the authority committed to it by Congress.

Certainly such a defense must be open to anyone charged with contempt of a congressional committee under Title 2, §192. The logic of the government's position is that in such a prosecution the prosecution need not prove that the committee is acting within the authority committed to it by Congress, and the defendant may not offer evidence to show that the committee is not, in his own individual case, acting within the limits of that authority. If the *Josephson* case stands for any such proposition, which it does not, then it overrules a long line of authority to the effect that Congressional committees may compel attendance of witnesses and testimony only in inquiries within Congress' limited powers. *Kilbourn v. Thompson*, 103 U. S. 168; *In*

re Chapman, 166 U. S. 61; *McGrain v. Daugherty*, 273 U. S. 135; *Jurney v. MacCracken*, 294 U. S. 125. The essence of the government's position is that there is an irrebuttable presumption that Congressional committees are acting within the limits of their own and Congress' authority. To uphold such a contention would be to hold that Congressional committees, are under no circumstances, subject to judicial review. Clearly that is not the law as stated by this Court.

4. Petitioner's Efforts to Make a Legal Objection to the Illegal Conduct of the Committee.

The government baldly asserts that a Congressional committee may adopt any procedure it wishes and such procedure will not be subject to judicial review (Opp. 22-24). Thus, according to the government, in the present case, although the petitioner was illegally arrested at the instance of the Committee and brought before the Committee in custody, his insistence on making a legal objection to this illegal conduct of the Committee prior to being sworn, constituted contempt. The government, however, can cite no authority for this extreme proposition since none exists. In any event, this is a novel question before this Court; no such extreme conduct on the part of a Congressional committee has ever been presented before this Court, and it is certainly a question that calls for full consideration and decision by this Court.

The government concedes that the efforts of the petitioner to make a legal objection does go to the question of wilfulness (Opp. 22). This is buttressed by the fact, not alluded to by the government, that it was the established procedure, as testified to by the Chairman of the Committee, to permit such legal objection prior to being sworn (R. 49, majority opinion at R. 238, dissenting opinion at R. 245). The government, nevertheless, justifies the refusal of the trial judge to permit petitioner to testify

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as to what he intended to say, on the ground that this testimony "would have served merely to confuse the issue before the jury. . . ." (Opp. 21). It is difficult to understand how admittedly relevant testimony could confuse the issue before the jury, unless one is to assume, as apparently the trial judge did, that the issue of petitioner's guilt or innocence was for the judge and not the jury. Further, that the government's real objection to this evidence is that it would have been favorable to the defense, is clear from the argument of the government, that the jury could have found from other evidence that the petitioner did not in fact wish to make a legal objection, but wished instead to read a 20 page statement in which he would have indicated his refusal to answer questions (Opp. 25). The petitioner alleged, as one of its grounds of error, this inconsistent ruling of the trial court denying the petitioner the opportunity to testify as to what he intended to say, and that he did intend to answer questions, while permitting the prosecution to introduce evidence and argue to the contrary (Pet. 8). And now, the government, while refusing to address itself to this error, uses this very error to support the verdict below. Certainly, the inference of the jury referred to by the government (Opp. 25), might well have been different, if petitioner had been permitted to testify as to what he intended to say, and that he, thereafter, would willingly have answered questions. As stated by Judge Prettyman in his dissent: "If it was the established practice that legal objections be stated by the witness before he was sworn, and if appellant could prove that all he wanted to do was to state his legal objections and thereafter be sworn and 'answer all questions', I do not see how he could be held guilty of 'wilful' default" (R. 245).

Clearly, the petitioner was entitled to present such evidence, and was entitled to such requested instructions to the jury (See Requested Instructions 28 and 29, R. 181). The trial judge's denial of this opportunity and of these instructions is obviously error.

CONCLUSION

We have not considered it necessary to reply to all of the contentions presented by the government. We believe sufficient has been shown both in the petition and in this reply to indicate that the questions presented by the petition, as well as the contentions raised in opposition by the government, present issues which have not heretofore been determined by the Court, and are of great public importance, and that the decision below contravenes principles established by this Court.

Respectfully submitted,

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